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No. 00-820

IN THE

Supreme Court of the United States

J.R. RIDGLEY WYVILL,

Petitioner,

v.

UNITED COMPANIES LIFE INSURANCE COMPANY, UNITED COMPANIES FINANCIAL CORPORATION and UNITED COMPANIES LENDING CORPORATION,

Respondents.

GERALD W. WALDROP,

Petitioner,

v.

UNITED COMPANIES FINANCIAL CORPORATION, UNITED COMPANIES MORTGAGE OF GEORGIA AND UNITED COMPANIES LENDING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

I. Whether the decision rendered below by the United States Court of Appeals for the Fifth Circuit abrogating the jury's verdict in favor of Petitioners under the Age Discrimination in Employment Act involves an important federal issue that conflicts with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000).

STATEMENT PURSUANT TO RULE 29.6

United Companies Financial Corporation is the parent corporation of United Companies Lending Group, Inc. United Companies Mortgage of Georgia has been merged with United Companies Lending Corporation. United Companies Lending Corporation has been merged with United Companies Lending Group, Inc.

United Companies Financial Corporation formerly owned United Companies Life Insurance Company. Currently, the parent corporation of United Companies Life Insurance Company is ING America Insurance Holdings, Inc.

Of the Respondents and the foregoing parent corporations, only ING America Insurance Holdings, Inc. (which owns ten percent or more of the stock of United Companies Life Insurance Company) issues shares to the public.

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Respondents, United Companies Financial Corporation, United Companies Life Insurance Company, United Companies Mortgage of Georgia and United Companies Lending Corporation (collectively referred to as "United Companies") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 212 F.3d 296 (5th Cir. 2000).

Respondents are mindful of this Court's admonition: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Nevertheless, that is precisely what Petitioners in this matter are asking this Court to do. In a feigned effort to transform this case into a matter worthy of certiorari, Petitioners cynically attempt to paint the Fifth Circuit as a renegade court, "steadfastly refus[ing]" to follow and "ignoring" the dictates of this Court in the realm of employment discrimination litigation. A more sober review of the Fifth Circuit's decision in this case, however, makes it clear that Petitioners are overreaching. While Respondents generally would not delve too deeply into the facts of a case in a brief in opposition to a petition for writ of certiorari, such a review is necessary here to establish the propriety of the Fifth Circuit's decision and concomitantly why a review by this Court is unnecessary.

STATEMENT OF THE CASE

I. Gerald Waldrop

During J.R. Ridgley Wyvill's and Gerald Waldrop's employment with United Companies[1], the Company employed approximately 2,700 workers and operated branch offices throughout the United States. Waldrop began working with United Companies in 1983 as branch manager in the Company's Dalton, Georgia branch office, and from 1991 until 1993, he

1. Respondent United Companies (through the Lending Corporation) principally provided mortgage loan products.

supervised four employees, Sandy Stafford (assistant manager), Pam McMillan, Cheryl Welch and Pat Little. Tr. Vol. I at 124-25, 152. Waldrop, in turn, was supervised by D. C. Brantley, who was two years older than Waldrop. Tr. Vol. I at 193, Vol. III at 184. Brantley reported to Joe Phillips. Tr. Vol. II at 144.

Over time, it became obvious that Brantley and Waldrop did not work well together. Tr. Vol. I at 164. In fact, on one occasion, Waldrop struck Brantley in the back of his head at a Company function. Tr. Vol. I at 164-66, 202-06, 256-58. On other occasions, Waldrop referred to Brantley, his supervisor, as a son-of-a-bitch; told Brantley that he would "whip his ass;" and threatened to "shut Brantley's mouth if he ever came to Dalton." Tr. Vol. I at 200-01; Brantley Dep. at 64, 66 ; Def. Wal. Ex. 6 (Tr. Vol. II at 201-02). In early 1991, the Company terminated the employment of Waldrop's son, Barry, which only exacerbated Waldrop's hostility towards the Company and his supervisors. Tr. Vol. II at 195-97.

In addition to the problems Waldrop had with his supervisor, he also had difficulties with the Dalton office employees and customers. For instance, Waldrop often yelled and cursed at employees and customers and lost his temper on a daily basis. Tr. Vol. V at 145-56; 273-76; 85-87; Little Dep. at 24-27, 29, 64-65. It suffices to say that Waldrop's employees were extremely upset and frightened by this behavior. Tr. Vol. V at 152-53, 280-81, 89, 93; Little Dep. at 31, 51.

In early 1991, Brantley wrote a series of memoranda to Phillips detailing the problems that he experienced with Waldrop. Def. Wal. Ex. 4 (February 11, 1991) (Tr. Vol. II at 198-99); 5 (February 12, 1991) (Tr. Vol. II at 199-201); 6 (March 14, 1991) (Tr. Vol. II at 201-22); Tr. Vol. II at 198-202. In the March 14th memorandum, an exasperated Brantley pleaded:

> Mr. Phillips, I will no longer put up with being called a S.O.B., threatened, and being blamed for company

> changes. I am losing the respect of fellow employees by enduring Mr. Waldrop's insubordination. . . . I am requesting that I be relieved from supervision of Branch # 145 [Dalton] immediately.

Def. Wal. Ex. 6 (Tr. Vol. II at 201-02).

After reviewing the memoranda detailing the problems with Waldrop and discussing these problems directly with Brantley, Phillips provided the letters to William S. Spann, Jr., the Company's Director of Human Resources. Tr. Vol. III at 208, Vol. IV at 126. Subsequently, Spann and Phillips decided to place Waldrop on involuntary medical leave for a period of sixty days, after which time he could return to his position as manager of the Dalton office. Tr. Vol. II at 148-49, Vol. III at 224-25. Waldrop initially refused to accept the leave. Tr. Vol. II at 148-49, Vol. I at 218-20. Spann, Phillips and Brantley traveled to Dalton and informed Waldrop that he was required to take leave. Tr. Vol. II at 147-50, Vol. III at 224-26, Vol. I at 148-49, Vol. V at 158. Spann drafted a memorandum reflecting the reasons why Waldrop was placed on involuntary leave. Tr. Vol. IV at 116-17, 125-26; Vol. III at 224-25; Def. Wal. Ex. 11 (Tr. Vol. IV at 84). Phillips testified that the leave was necessitated by Waldrop's problems in the office and with his supervisor. Tr. Vol. II at 148-49, 206-07.

After his paid leave of absence, Waldrop resumed his duties, Tr. Vol. I at 151; Vol V. at 158-60, and his behavior worsened. Tr. Vol. V at 160, 274-76. Waldrop's employees pleaded with him to correct his behavior, but nothing changed. Tr. Vol. V at 159-61; Little Dep. at 35-37.

In September, 1991, Waldrop directed his anger at office worker Cheryl Welch by yelling at her and shaking a pencil in her face in front of his staff because she had made an account card error. Tr. Vol. V at 87-90, 275-76, Vol. I at 154-55. Welch was so upset that she broke down and cried. Tr. Vol. V at 88.

Subsequently, Stafford spoke with Spann about Waldrop's behavior. Tr. Vol. V at 163-65. Stafford said that the office employees were afraid of Waldrop. Tr. Vol. V at 163-65. A few weeks later, Waldrop told Stafford that he did not want employees in the office to laugh or talk. Tr. Vol. V at 167-68. When Stafford protested, Waldrop yelled that "If anybody don't like my attitude, they get [*sic*] hit the back door and I'll run this D-A-M [*sic*] place by myself. . ." Tr. Vol. V at 168. This outburst brought Stafford to tears. Tr. Vol. V at 168.

After these incidents had been brought to the attention of Spann and Phillips, Spann arranged for Waldrop to fly to the home office in Baton Rouge in November, 1991 for a formal reprimand. During this meeting, Spann informed Waldrop that further conduct of this nature would lead to termination. Tr. Vol. II at 150-51, Vol. III at 225, Def. Wal. Ex. 13 (Tr. Vol. IV at 84). After that meeting, Spann prepared a memorandum reflecting what had been discussed with Waldrop. Tr. Vol. IV at 84-88; Def. Wal. Ex. 13 (Tr. Vol. IV at 84).

Upon his return to Dalton, Waldrop called a meeting of his staff ostensibly to apologize to his employees as suggested by Spann during the counseling session. Tr. Vol. V 91-93, 168-70. Waldrop started the meeting by stating "I want to wish everyone a DAMN good morning." Tr. Vol. V at 91-93, 168-70; Def. Wal. Ex. 16 (Tr. Vol. V at 94-95). The tone of the meeting was sarcastic and "filled with retaliation" and soon after it, Waldrop resumed his abusive behavior towards his staff, customers, and others. Tr. Vol. V at 91-93; Def. Wal. Ex. 14 (Tr. Vol. V at 282-83) & 16 (Tr. Vol. V at 94-95); Tr. Vol. V at 92, 168-70. For example, in January, 1992, an elderly man came into the office and requested directions to an attorney's office. Tr. Vol. V at 90-91. For no apparent reason, when Waldrop heard this, he ran to the waiting room and shouted at the man, informing him that he would not give directions to him. Tr. Vol. V at 90-91. After McMillan gave directions to the man, Waldrop screamed at her for doing so.

Def. Wal. Ex. 17 (Tr. Vol. V at 95-96). Welch recorded the details of this incident in a memorandum. Def. Wal. Ex. 17 (Tr. Vol. V at 95-96).

In April, 1992, Spann learned that customers had complained about Waldrop's behavior. Tr. Vol. IV at 126-27. Specifically, Waldrop used abusive and inappropriate language towards customers Donna Hooper (Hooper Dep. at 7-15, 17-18), Kim Davis (Tr. Vol. V at 257-64) and Brenda Burgess (Tr. Vol. V at 241-49).

As a result of the continued abusive conduct and the belief that the Company had not done enough to control Waldrop's behavior, the Dalton staff began to leave United Companies. Tr. Vol. V at 89-90, 170-71, 173; Little Dep. at 31, 51-52. McMillan resigned in November, 1992 because she could no longer endure Waldrop's treatment. Tr. Vol. V at 281. Welch resigned shortly thereafter for the same reason. Tr. Vol. V at 93. Furthermore, both Stafford and Little were looking for work elsewhere. Vol. V at 89-90, 170-71, 173; Little Dep. at 31, 51-52.

After they resigned, McMillan and Welch sent letters to Spann complaining about Waldrop's behavior and explaining the reasons for their resignations. Tr. Vol. V at 93-96, 283-86; Def. Wal. Ex. 14 (Tr. Vol. V at 282-83), 15 (Tr. Vol. V at 282-83) & 16 (Tr. Vol. V at 94-95), 17 (Tr. Vol. V at 94-95). Upon receiving the letters, Spann called McMillan, Welch and Stafford. Tr. Vol. V at 172-74, 109-10, 285; Vol. IV at 88-89. Through his conversations with them, Spann discovered that Waldrop's behavior had not improved since the November, 1991 meeting and that Waldrop's employees actually feared for their safety because of his abusive treatment. Tr. Vol. V at 172-74, 109-10, 285; Vol. IV at 88-89; Little Dep. at 79.

Spann then discussed with Phillips the information he obtained about Waldrop's conduct, and they decided to terminate Waldrop's employment. Tr. Vol. IV at 88-91, 70. Although Spann

and Phillips notified Terrell Brown of their decision before they informed Waldrop, Brown was not otherwise involved in the decision to terminate Waldrop for his behavior. Because the Company was concerned with Waldrop's reaction to his termination, Spann, Phillips and Brantley met with him at a hotel in Tennessee. Tr. Vol. IV at 91-93. They instructed Waldrop's employees to change the door locks and close the office for the remainder of the day as a safety measure. Tr. Vol. IV at 92-94, Vol. V at 175-77; Little Dep. at 54-55. Waldrop was terminated for his abusive behavior on January 26, 1993. R. Vol. 9 at 1468 [Dkt. 183]; Tr. Vol. I at 113, 182.

II. J. R. Ridgley Wyvill

Wyvill worked for United Companies Life Insurance Company ("Life Company") in Baton Rouge until February 1, 1993 as the manager of the credit life department. Tr. Vol. II at 234-35; R. Vol. 9 at 1466 [Dkt. 183]. Wyvill's duties included coordinating and monitoring credit life insurance policies sold to customers and ensuring that the credit life staff maintained those policies. R. Vol. 9 at 1466 [Dkt. 183]. He was also responsible for supervising employees in this department, including Margaret Moon. Tr. Vol. II at 241, Vol. V at 22-23.

Wyvill reported to Lindsay Seals who was an executive vice-president of the Life Company. Tr. Vol. IV at 7, 36. Seals reported to Gary Warrington, the president of the Life Company. Tr. Vol. IV at 36.

In 1992, the Life Company made the decision to exit the credit life business and stopped issuing credit life insurance policies. Tr. Vol. V at 29; Vol. IV at 42-43; Vol. III at 58. Consequently, the workload of the department decreased steadily until it was ultimately disbanded altogether in 1994. Tr. Vol. IV at 42-43, 183-85; Vol. V at 29, 37.

Prior to Wyvill's termination, Seals had several discussions with Wyvill concerning his conduct and attitude towards

management. Tr. Vol. IV at 13. Despite these counseling sessions, in January 1993, Wyvill made several disruptive telephone calls to employees of the Lending Corporation (a separate and distinct division of United Companies). These calls centered on the Lending Corporation's termination of Waldrop and, ironically, ultimately led to Wyvill's termination.

The first call was made on January 29, 1993 to Carl Scott, a Lending Corporation branch manager in Nashville. Scott Dep. at 37-44. Scott had never met Wyvill before. Scott Dep. at 35, 56. Wyvill called Scott "out of the clear blue" and informed him that the Company "had gotten the Chief [Waldrop]." Scott Dep. at 37-44. Wyvill also told Scott to "watch his backside." Scott Dep. at 37-44. This telephone call upset Scott, who reported the incident to Joe Phillips, the Lending Corporation's senior vice-president in charge of loan production. Tr. Vol. II at 161-62, 218; Scott Dep. at 44, 48-49. Phillips requested that Scott prepare a memorandum setting forth exactly what had transpired during this conversation. Tr. Vol. II at 165. Def. Wyv. Ex. 19 (Tr. Vol. II at 216-17).

On the same day of the Scott call, Wyvill called Sandy Stafford, the assistant manager in the Lending Corporation's Dalton office where Waldrop had worked. Tr. Vol. V at 186-88. Like Scott, Stafford had never met Wyvill before and had only spoken to him on two previous occasions about credit life insurance during her nine years of employment. Tr. Vol. V at 184-85. Waldrop had been terminated three days before Wyvill called Stafford. Tr. Vol. V at 186.

Wyvill asked Stafford a number of questions concerning the circumstances surrounding the termination of Waldrop and warned Stafford (who was being considered to replace Waldrop as branch manager [Tr. Vol. V at 177-78]) that if she accepted the position, she would be taking "blood money." Tr. Vol. V at 186-88. Wyvill said nothing to Stafford about an alleged investigation of the UnLink, an anonymous newsletter which had been critical of United Companies management. Tr. Vol. V

at 187. Stafford was extremely upset by the call. Tr. Vol. V at 177-78, 187.

Shortly after receiving Scott's report, Phillips checked the telephone records of calls made from Wyvill's office, Tr. Vol. II at 164-65, 218; Def. Wyv. Ex. 18 (Tr. Vol. II at 218-19), and discovered that Wyvill had placed calls to a number of former employees who had been terminated or who had left under unpleasant circumstances, including Waldrop. Tr. Vol. II at 220; Vol. IV at 9; Def. Wyv. Ex. 18 (Tr. Vol. II at 218-19); Dep. of Callihan at 26-28. The records also reflected that Wyvill had called the Nashville and Dalton branches after Waldrop's termination. Def. Wyv. Ex. 18 (Tr. Vol. II at 218-19); Dep. of Callihan at 26-28.

Phillips notified Spann about Wyvill's calls. Tr. Vol. IV at 77-78. Spann and Roger Clark (the president of the Lending Corporation) called Stafford, and she told them what Wyvill had said to her. Tr. Vol. IV at 77-78. Tr. Vol. V at 189-90, 194. Following this, a meeting was held which was attended by Phillips (age 45), Spann (age 47), Terrell Brown, Sr. (age 53), United Companies Financial Corporation's chairman and chief executive officer, Roger Clark (age 46), Gary Warrington (age 53), Lindsay Seals (age 58), Daniel Callihan (age 39), regional vice-president of the Lending Corporation, and Wyvill. Tr. Vol. IV at 9-13, 37-40, Vol. II at 168; Callihan Dep. at 24, 27-28. Wyvill was questioned about the telephone calls, particularly the ones made to Stafford and Scott. Tr. Vol. II at 221; Vol. III at 167. At no time during this meeting did Wyvill state that anyone in the Company had authorized him to place these calls, nor did he offer any explanation for them. Tr. Vol. IV at 41, 12-13, 79-80, 37-40.

Based on this, Seals and Warrington decided to terminate Wyvill with the consent of everyone at the meeting. Tr. Vol. IV at 10-12, 16-17, 40-42, Tr. Vol. IV at 79-81, 71; Vol. II at 223; Vol. III at 131-33, 167-169. Wyvill was terminated effective February 1, 1993.

Because the Life Company was down-sizing at about the time of Wyvill's termination, his position was eliminated and his job duties were assumed by other employees. Tr. Vol. IV at 15-16, 58, 183. On February 19, 1993, the Life Company experienced a reduction-in-force that resulted in the terminations of approximately fifteen percent of its workforce. Tr. Vol. IV at 40-41, 43-44. Had Wyvill not been terminated on February 1, 1993, he unquestionably would have been terminated as part of the reduction-in-force. Tr. Vol. IV at 40-45, 81.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

I. Gerald Waldrop

Following his termination, Waldrop filed a Complaint alleging federal disability and age discrimination against his former employer, United Companies Mortgage of Georgia, and its parent, United Companies Financial Corporation. R. Vol. 2 at 280-87 [Dkt. 1]. United Companies filed a Motion for Summary Judgment requesting the dismissal of Waldrop's claims, R. Vol. 18 at 16-140 [Dkt. 43, 44], which was initially granted by the district court. R. Vol. 18 at 6-12 [Dkt. 46].

Subsequently, Waldrop filed a Motion for Reconsideration and provided what he claimed was "newly discovered" evidence. The district court, despite the high standard for relief under Fed. R. Civ. P. 60(b), granted Waldrop's Motion for Reconsideration and vacated the summary judgment with regard to the age discrimination claim. R. Vol. 8 at 1561-71 [Dkt. 157].

II. J. R. Ridgley Wyvill

Wyvill filed a similar lawsuit against United Companies Financial Corporation and United Companies Life Insurance Company, alleging violations of federal and state age and disability discrimination statutes as well as claims of intentional infliction of emotional distress and violations of federal and state securities laws. R. Vol. 1 at 2730-40 [Dkt. 1].

United Companies again filed a Motion for Summary Judgment, R. Vol. 3 at 2368-2535 [Dkt. 61], and the district court dismissed Wyvill's federal disability discrimination claim, his state discrimination claims, and his claims under securities laws. R. Vol. 8 at 1664-74 [Dkt. 147]. The only claims that remained were Wyvill's federal age discrimination claim and his claim for intentional infliction of emotional distress. R. Vol. 8 at 1664-74 [Dkt. 147]

III. Consolidated Proceedings

The court-ordered consolidated claims of Wyvill and Waldrop originally proceeded to trial on October 28, 1996. R. Vol. 1 at 2581-2582, 2609-18 [Dkt. 34, 49]. R. Vol. 13 at 863-64 [Dkt. 262]. Prior to trial, United Companies filed a Motion in Limine seeking, *inter alia*, to preclude Wyvill and Waldrop from introducing "anecdotal" evidence presented by former employees who were not "similarly situated" to Wyvill or Waldrop and opinion evidence from witnesses concerning their belief that others in the 2,700-employee company were discriminated against because of their age. R. Vol. 12 at 1081-85 [Dkt. 233]. The district court denied United Companies' Motion in Limine in this regard. R. Vol. 13 at 912-16 [Dkt. 252].

The initial trial lasted only three days. On the morning immediately following the completion of Wyvill's and Waldrop's cases, their counsel requested a mistrial, which was granted by the district court. R. Vol. 13 at 854-58 [Dkt. 265, 267].

The second trial lasted six days. United Companies moved for Judgment as a Matter of Law at the close of Wyvill's and Waldrop's cases and then again before closing arguments were held. Tr. Vol. III at 244-50, Vol. VI at 3.

The jury concluded that Wyvill and Waldrop had been discriminated against on the basis of age and that the discrimination was willful. R. Vol. 16 at 440-41 [Dkt. 361].

The district court entered a money judgment in favor of Wyvill and Waldrop that included an award to Wyvill of $20,000 in front pay. R. Vol. 16 at 433-39 [Dkt. 362, 363].

United Companies filed a Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial and to Amend Judgment. R. Vol. 16 at 373-424 [Dkt. 368, 369]. The district court issued an Amended Judgment after denying most of the relief sought in the Motion. R. Vol. 19 at 11-22 [Dkt. 409], R. Vol. 19 at 9-10 [Dkt. 410]. Thereafter, United Companies filed a timely Notice of Appeal. R. Vol. 19 at 4-6 [Dkt. 413].

IV. Appeal

The appeal was multifaceted. First, United Companies contended that the verdicts finding age discrimination were not supported by substantial evidence and should be reversed. Specifically, the Company contended that it had unquestionably proven that the Wyvill and Waldrop terminations were caused by their improper and disruptive behavior and that the two did not present substantial evidence showing that these legitimate reasons were pretexts for discrimination.

Further, as already alluded to, United Companies argued that the district court erred in permitting Wyvill and Waldrop to parade a number of former employees to testify about their opinion that a "trend" existed at United Companies whereby older workers were replaced by younger workers. Specifically, the Company contended that Wyvill and Waldrop made no showing that these individuals were similarly situated to them and, as such, the evidence should not have been admitted and unfairly prejudiced United Companies by placing the Company in the untenable position of having to litigate employment decisions involving former employees who were not similarly situated to the two plaintiffs.

In the alternative, United Companies asked that the willfulness findings be reversed since there was no evidence

that United Companies considered the ages of Wyvill and Waldrop when making the termination decisions.

Finally, United Companies argued that Wyvill's back pay period should have been cut off on February 19, 1993 because of the Life Company's reduction-in-force in which Wyvill would have been terminated.

V. Decision of the Fifth Circuit Court of Appeals

On May 31, 2000, two weeks before this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), the Fifth Circuit Court of Appeals, remarking that "the district court allowed the plaintiffs to saturate the record with testimony pertaining to other employees in other branches of the company who held different positions under different supervisors and were terminated at different times," overturned the jury's verdict concluding instead that "neither Wyvill nor Waldrop produced sufficient evidence to allow a reasonable jury to infer that United Companies terminated them because of age." Petitioners' App. A at 2a.

On June 21, 2000, Wyvill and Waldrop filed a Petition for Rehearing En Banc which was denied on August 21, 2000. Petitioner's' App. C at 40a.

PETITIONERS' ERRONEOUS REPRESENTATIONS OF FACT

Failing to obtain a rehearing in this matter, Wyvill and Waldrop have filed this Petition for Writ of Certiorari. In an attempt to discredit the Fifth Circuit's decision, they make a number of factual assertions in their Petition which are inaccurate. While United Companies has responded to some of the factual misstatements by directing this Court's attention to the trial record in the Factual Background Section of this memorandum, there are other unsupported factual assertions which merit special consideration.

1. On page 4 of the Petition, Wyvill claims that he proved he was replaced by someone under forty years of age. However, the record is clear that Wyvill merely speculated that he had been replaced by thirty-three year old employee Margaret Moon. Tr. Vol. II at 241-42. In fact, there was no evidence that Moon was promoted to Wyvill's position. Moon testified that in 1989, approximately four years before Wyvill's termination, Wyvill (who had originally hired Moon) promoted her to supervisor. Tr. Vol. V at 23. When Wyvill was discharged in 1993, Moon did not receive a promotion or pay raise. Tr. Vol. V at 24-25. Further, she never assumed any of the managerial responsibilities that Wyvill had performed. Tr. Vol. V at 25. The only change in her job duties after Wyvill's termination was that the amount of her work increased slightly. Tr. Vol. V at 25-26. Seals, Warrington and Spann confirmed that Wyvill was not replaced by Moon and that Wyvill's duties were dispersed among different employees following his termination. Tr. Vol. IV at 15-17, 58; Tr. Vol. III at 218-20. Wyvill's failure of proof in this basic regard, coupled with his inability to show that similarly situated younger employees were treated better than he was, sufficed to justify judgment as a matter of law under the shifting burden analysis in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149-50 (5th Cir. 1995) (judgment entered notwithstanding jury verdict because the plaintiff could not demonstrate that he had been replaced by someone younger; the employer's contention that the plaintiff's position was simply eliminated was supported by substantial evidence); *Fields v. J. C. Penney Co., Inc.*, 968 F.2d 533, 537-38 (5th Cir. 1992) (judgment notwithstanding verdict of age discrimination granted where the plaintiff failed to demonstrate that he was replaced by someone younger than him). *See also*

Lilley v. BTM Corp., 958 F.2d 746, 752 (6th Cir. 1992) (district court's denial of motion for judgment notwithstanding jury verdict finding age discrimination was reversed; the plaintiff could not show that he was replaced by someone younger even though his work duties were distributed among remaining workers in the department and the employer hired a younger replacement only nine months after his termination).

2. In various parts of the Petition, Waldrop claims that the jury's verdict of illegal age discrimination is supported by the deposition testimony of Brantley in which he states that he did not receive the complaints lodged by Stafford, McMillan, Little and Welch about Waldrop's behavior. Tr. Vol. V at 312-19. Waldrop, however, does not present any evidence contradicting the numerous conversations that Spann had with these employees about Waldrop's abusive behavior. Waldrop inexplicably assumes that because Brantley stated that he was unaware of the complaints from Stafford, McMillan, Welch and Little regarding Waldrop's conduct, that somehow they were not made and are thus part of United Companies' purported scheme to cover its illicit motivation. At a minimum, the uncontradicted testimony demonstrates, however, that Spann, in his capacity as the director of human resources, was told about Waldrop's erratic and troubling behavior by Stafford and later by McMillan and Welch in their letters to him following their resignations.

3. In support of his position that he offered sufficient evidence to establish pretext, Wyvill does not claim that he did not make the calls he was ultimately terminated for; rather, he asserts that the calls were actually authorized by Tee Brown, the son of former United Companies' CEO, Terrell Brown, Sr.

Specifically, Wyvill claims that Tee Brown asked him to make the calls for the purpose of investigating the "Unlink," an underground newspaper published by employees of United Companies, critical of the entity. There are a host of uncontradicted facts, however, which conclusively rebut this claim.[2] To begin with, Wyvill decided not to notify his supervisors, or Brown, Sr., about the full-scale UnLink investigation that he allegedly made at the request of a manager trainee, even though such an investigation went far beyond the scope of his regular duties. Tr. Vol. III at 37-39, 56. Also, there is no connection between Wyvill's conversation with Carl Scott and the UnLink. Scott's testimony concerning the substance of the telephone conversation is unrebutted — Wyvill called him "out of the blue," informed him of the termination of Waldrop, and warned him that his job was in jeopardy and to "watch his backside." Scott Dep. at 37-44; Tr. Vol. III at 41-45; Def. Wyv. Ex. 19 (Tr. Vol. II at 216-17). There was no mention of the UnLink. Scott Dep. at 37-44; Def. Wyv. Ex. 19 (Tr. Vol. II at 216-17). The same is true regarding his conversation with Stafford. Wyvill admits to calling Stafford about her accepting the Company's offer of the branch manager position that had previously been held by Waldrop. Tr. Vol. III at 13-14. Although Wyvill disputes who initiated the call and what was discussed during the call, he admitted that he discussed the termination of Waldrop with Stafford. Tr. Vol. III at 13-14, 48-49. At trial, Wyvill testified that he implied to Stafford that the reason she was offered the branch manager position was to humiliate Waldrop. Tr. Vol. III at 13. Wyvill did not produce any evidence

2. Tee Brown, who was working as a trainee in the Life Company at the time, confirmed general discussions about an article appearing in the UnLink with Wyvill, but never asked him to conduct any type of investigation (much less make threatening telephone calls to Lending Corporation employees). Tr. Vol. IV at 131-37.

contradicting testimony regarding how upset Stafford became after receiving his call. Moreover, he did not contradict testimony that management called Stafford after the review of Wyvill's telephone records to inquire about the nature of their discussion. Wyvill presented no motive as to why Stafford would fabricate her version of the telephone call. Also, telephone records obtained by Phillips showed that Wyvill placed a number of calls to former employees. Def. Wyv. Ex. 18 (Tr. Vol. II at 218-19). Some of these worked for competitors and others had been terminated under extremely difficult circumstances, including Waldrop, who had been terminated just a few days before. Wyvill admitted making all of these calls. Tr. Vol. III at 50-52. After this information had been gathered, officials from both the Lending Corporation and the Life Company met to discuss Wyvill's misconduct. When summoned to the meeting, Wyvill failed to provide an adequate excuse for what he had done. He could have stated that he did what he did because he felt that he had been directed to do so by Tee Brown, but he did not. Tr. Vol. III at 11, 50-52, 55.

4. In an effort to establish disparate treatment, Waldrop attempted to show that someone younger than him, Dwayne Burks, did what Waldrop did and was treated more favorably. Since the circumstances surrounding Waldrop's and Burks' situations are entirely different, the Fifth Circuit gave the comparison little evidentiary credence. One difference involves the decision-makers involved in each of the decisions. Waldrop was terminated by Spann and Phillips in early 1993. On the other hand, Burks was demoted and removed from supervision by the president of the Lending Corporation, G. G. Hargon, in the fall of 1996. Tr. Vol. IV at 97-99. Hargon was not even employed by United Companies when Waldrop was terminated;

Roger Clark was the president of the Lending Corporation at that time. Tr. Vol. IV at 95, Vol. V at 51. Also, Waldrop had a four-year history of failing to get along with his supervisors, co-workers and customers. Burks did not have a similar history of incidents involving supervisors and customers that had been reported to the Company. Tr. Vol. IV at 95-100, Vol. V at 65-69. Additionally, Burks was an area supervisor in North Carolina and was responsible for seven branches in North Carolina, South Carolina and Virginia — a position different than the branch manager position held by Waldrop in Georgia. Tr. Vol. II at 24-25. Further, Burks was supervised by Mark McKinney who never supervised Waldrop. Tr. Vol. IV at 94; Vol. II at 11. Even assuming that the circumstances involving Waldrop and Burks are "nearly identical," Waldrop was treated better than Burks. Waldrop was given several chances to correct his behavior before his termination, including a paid leave of absence for a short and specified duration, after which he was allowed to return to his manager position. Burks was never given the opportunity to return to his area supervisor position and ultimately resigned during his indefinite leave. Tr. Vol. IV at 98-100. Finally, United Companies objects to the suggestion made by Petitioners to the effect that the evidence in the record indicates that more than twenty-five employees left United Companies because of Burks' bad behavior. Petition at 13. There is no evidence in the record that twenty-five employees resigned from United Companies because of Burks' behavior. When attempting to testify in this regard, Petitioners' witness, Sandra Moore, admitted that she was speculating as to the reasons why employees had left the Company. The district court sustained United Companies' objection and refused to allow Moore to speculate about the reasons why employees left United Companies.

Tr. Vol. II at 20. Incredibly, Petitioners selectively cite to Moore's testimony in the Appendix (App. F 154a) to the Petition for Writ of Certiorari and completely omit the ruling made by the district court on United Companies' objection. United Companies refers the Court to the complete record excerpt in the attached Appendix. App. at 1 (Tr. Vol. II at 20).

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DECISION IN *REEVES*

In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), this Court addressed the issue of "whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action." *Id.* at 2103. As the Second Circuit recently pointed out, this Court's "answer to this question cannot be reduced to a simple 'Yes' or 'No.' " *Schnabel v. Abramson*, 232 F.3d 83, 89 (2nd Cir. 2000). Rather, as this Court explained:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. *In appropriate circumstances*, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt . . . Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may*

> *permit* the trier of fact to conclude that the employer unlawfully discriminated.

120 S. Ct. at 2108-09 (emphasis added) (internal citations and quotation marks omitted).

The decision in *Reeves* "did not categorically conclude that a prima facie case plus pretext evidence 'permits' a trier of fact to find that a plaintiff has satisfied his ultimate burden; it noted, instead, that such circumstances 'may permit' a trier of fact to conclude that a plaintiff had met his ultimate burden." *Schnabel*, 232 F.3d at 89.

To that end, this Court in *Reeves* explained:

> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontraverted evidence that no discrimination had occurred. To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review . . .
>
> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and

> that properly may be considered on a motion for judgment as a matter of law."

Id. at 2109 (internal citations and quotation marks omitted).

Applying those principles to the facts of the *Reeves* case, this Court concluded that the Fifth Circuit erred and that the employer "was not entitled to judgment as a matter of law." *Id.* at 2110. In support of that finding, this Court noted that the plaintiff established his prima facie case and offered sufficient evidence of pretext. The plaintiff also offered additional evidence that the person principally responsible for his termination (Powe Chesnut) was "motivated by age-based animus." *Id.* at 2110. Specifically, this Court cited the following — (1) Chesnut told the plaintiff that he "was so old [he] must have come over on the Mayflower;" (2) when the plaintiff was having difficulty starting a machine, Chesnut told him that he "was too damn old to do [his] job;" (3) Chesnut would regularly curse at Plaintiff and shake his finger in his face; (4) a coworker (Joe Oswalt), who was 24 years younger than the plaintiff, corroborated that there was an "obvious difference" in how Chesnut treated them; (5) the plaintiff offered evidence that he and Oswalt had nearly identical rates of productivity yet only the plaintiff's line was subjected to an efficiency study and only the plaintiff was placed on probation (Chesnut made both the decision to conduct the study of the plaintiff's line and to suspend him); and (6) the employer, which allegedly terminated the plaintiff for falsifying records, offered no evidence of falsification. *Id.* at 2110-2111.

II. PETITIONERS' CRITIQUE OF THE FIFTH CIRCUIT'S DECISION HERE IS UNAVAILING.

In suggesting that the Fifth Circuit's decision here is erroneous, Petitioners rely on two primary premises: (1) "in reaching its decision, the Fifth Circuit impermissibly ignored or dismissed as irrelevant virtually all of Petitioners' evidence," and (2) "in direct contravention of this Court's decision in *Reeves*, the Fifth Circuit again misconceived

Petitioners' burden of proof, holding that the proof of their prima facie case, and their evidence rebutting the validity of United Companies' proffered explanations for them, was not sufficient to support their age discrimination claims." Petition for Writ of Certiorari at 21 and 22. As illustrated below, neither assertion has merit.

A. Ignoring Evidence

Petitioners contend that the Fifth Circuit impermissibly ignored their evidence in several respects:

1. Anecdotal Testimony Regarding Other Employees

First, they note that the Fifth Circuit "held that the district court abused its discretion by allowing into evidence 'anecdotal testimony from and about other employees' who were fired after Terrell Brown made his so-called 'stray remarks' . . ." Petition for Writ of Certiorari at 14. Clearly, the Fifth Circuit did not err in this regard. Furthermore, this Court's decision in *Reeves* is completely inapplicable to the evidentiary issues decided by the Fifth Circuit in this case. Importantly, Petitioners do not cite any Supreme Court authority or any conflicting authority from any other Circuit that would satisfy the high threshold warranting a writ of certiorari to review the Fifth Circuit's ruling on the irrelevant anecdotal evidence.

As mentioned above, prior to the October 1996 trial, United Companies filed a Motion in Limine seeking to exclude evidence of alleged age discrimination from and about former employees who were not similarly situated to Wyvill and Waldrop on the grounds that it was irrelevant, unfairly prejudicial and likely to mislead the jury. R. Vol. 12 at 1081-85 [Dkt. 233]. The district court denied the Motion and permitted a number of former employees to testify about their own circumstances even though they had no personal knowledge as to the reasons for the terminations of Wyvill and Waldrop and were not "similarly situated" to them. Also, many of Wyvill's and Waldrop's

witnesses as well as their counsel offered testimony and argument concerning a number of other employees who had left United Companies over a period spanning more than ten years and contended that this constituted evidence of age discrimination from which the jury could infer that Waldrop and Wyvill were terminated because of their age.

It is well established in the Fifth Circuit that testimony of a former employee in an individual discrimination case is relevant and admissible only when the former employee has personal knowledge of the events surrounding the employment decision concerning the plaintiff or when the former employee was "similarly situated" to the plaintiff. *Goff v. Continental Oil Co.*, 678 F.2d 593, 596-97 (5th Cir. 1982); *Harpring v. Continental Oil Co.*, 628 F.2d 406, 409 (5th Cir.), *cert. denied*, 454 U.S. 891 (1981).

As the Fifth Circuit correctly noted here, introduction of other alleged discriminatory acts with no relation to the discrimination claimed by a plaintiff creates an unfair "trial within a trial" on issues that have little, if any, probative value.[3]

3. The facts of this case make it clear that concerns regarding "trials within the trial" are well founded. By allowing Wyvill and Waldrop to suggest to the jury that numerous former employees were discriminated against, the Company was forced to litigate all of these employment decisions, even though they had nothing to do with the terminations of Wyvill or Waldrop. For example, United Companies had to rebut the allegations of age discrimination raised by Garold Cooke (who worked as an area supervisor in Ohio for the Lending Corporation) by calling the individual (Mark McKinney) who made the decisions to demote and terminate Cooke because of unsatisfactory loan production. Tr. Vol. V at 48-64. Neither Waldrop nor Wyvill claimed that McKinney had anything to do with their terminations or ever supervised them. Because of the time constraints placed on the parties by the district court, United Companies could not present all of the documentary and testimonial evidence needed to explain the decisions to demote in the Fall of 1995 and later terminate Cooke in January, 1996 (almost three years after Wyvill and Waldrop's terminations). If the Company was

(Cont'd)

Sims v. Mulcahy, 902 F.2d 524, 531 (7th Cir.), *cert. denied*, 498 U.S. 897 (1990). The evidence was irrelevant, and even if it was relevant, it should have been excluded due to the unfair prejudice incurred by defendants. *Id.* at 530. *See also Harpring*, 628 F.2d at 410 (testimony of witness excluded "because it would involve trying another lawsuit within the existing lawsuit").

As indicated in *Goff* and *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1221 (5th Cir. 1995), employees are "similarly situated" when they work side by side with one another, hold similar employment positions and work under the same supervisors. *See Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988). Here, there is no doubt that the employees in question were not "similarly situated," and thus their testimony was not probative of discrimination and should have been excluded. *Haskell v. Kaman Corp.*, 743 F.2d 113, 120-22 (2nd Cir. 1984).

Specifically, the following witnesses testified at trial about their individualized beliefs that they were discriminated against by the Company, while at the same time admitting that they had no personal knowledge as to the reasons why Wyvill or Waldrop were terminated: James Davis, a former regional

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(Cont'd)
unable to respond fully to this one termination, it certainly could not respond to allegations made about the forty plus names recited by Wyvill's and Waldrop's counsel.

Another example of the unfair prejudice to United Companies is found in the repeated contention by Wyvill and Waldrop that a number of former employees who had worked for the Company for a long period of time (David Prejean, Gerald Langlois and Floyd Desormeaux) had been discriminated against by the Company on account of their age. Tr. Vol. II at 94-95, 97-99. United Companies was forced to call these witnesses (all of whom had retired voluntarily for different reasons) to testify so that they could explain to the jury they had not been discriminated against on account of their age. Tr. Vol. V at 10-15 (Langlois), 232-39 (Prejean) and 299-310 (Desormeaux).

vice-president for the Lending Corporation in Florida (Tr. Vol. II at 60-115); Garold Cooke, a former area supervisor in the Lending Corporation in Cincinnati (Tr. Vol. II at 28-59); Dennis Locklear, a former branch manager in Rome, Georgia who was demoted for low production in 1990 and then resigned (Tr. Vol. I at 259-92); and Floyd Desormeaux , a former vice-president in the Lending Corporation who retired at the age of sixty-two (Tr. Vol. V at 299-310). Incredibly, the district court allowed many of these witnesses (as well as Joe Phillips) to testify not only about their individualized experiences, but also about their belief that others in the Company were terminated because of their age.

Furthermore, the district court, over United Companies' strenuous objection, allowed counsel for Wyvill and Waldrop to question Spann and Brown, Sr. about the circumstances surrounding the employment and terminations of the following employees: Edward Andrews, Betty Ruth Axley, Ronnie Bryan, Neal Vickers, Gary Cochran, Bonnie Cox, Louis Craig, Michael Fowler, Bonnie Hathcock, Bill Hood, Kenneth Jernigan, James Kennedy, Davis McKenzie, Daniel Oakes, Jacques Pearson, Michael Shipley, Al Shiflett, and John Thudium. Tr. Vol. III at 230-234, 237-38 (limiting instructions), 238-241, 103-05, 115-16. Then, during closing arguments, counsel for Wyvill and Waldrop recited the names of forty-four former employees and claimed that these individuals (despite the lack of any evidence whatsoever) were discriminated against by United Companies because of their age. Tr. Vol. VI at 29-34. Further, counsel for Wyvill and Waldrop suggested to the jury that it could infer an adverse statistical significance from these numbers although no expert testimony was offered in this regard. Tr. Vol. VI at 31-32.

None of the former employees who testified or who were testified about were "similarly situated" to Wyvill. Not one of them worked in the Life Company where Wyvill worked. The Life Company was a separately incorporated entity having its

own management structure that was completely independent of the Lending Corporation where all of these employees worked. Further, none of the employees who testified or who were testified about reported to either Lindsey Seals or Gary Warrington like Wyvill. Additionally, no evidence was presented showing that these individuals were terminated under circumstances similar to those relating to Wyvill's termination.

Likewise, none of these former employees were "similarly situated" to Waldrop. None of them worked in the Lending Corporation as a branch manager supervised by D.C. Brantley and Joe Phillips at the time of Waldrop's termination in 1993. Further, Waldrop presented no evidence showing that any of these individuals were terminated under circumstances similar to those relating to Waldrop's termination.

Recognizing this, Wyvill and Waldrop now contend that this evidence was properly admitted to prove that a pattern and practice of age discrimination existed at the Company at the time of their terminations. However, none of this evidence constitutes admissible pattern and practice evidence.

The Fifth Circuit recently explained the circumstances under which "anecdotal" evidence could be used to prove an individual claim of age discrimination under a "pattern and practice" theory. In *Mooney*, *supra*, the plaintiffs sought to introduce at trial the testimony of ten "anecdotal" witnesses in support of their pattern and practice claim of age discrimination. 54 F.3d at 1220. The district court noted that the probative value of such evidence was outweighed by the "overwhelming difficulties" in allowing the evidence to be introduced. *Id.* at 1220-21.

The court in *Mooney* agreed with the district court that the plaintiffs were required to establish "that the proffered anecdotal witnesses were sufficiently similar to themselves so that the witnesses' testimony would have a tendency to show 'standard [discriminatory] operating procedure' and a 'regular rather than

unusual practice' of discrimination." 54 F.3d at 1221. The court further explained that:

> Testimony of anecdotal witnesses with different supervisors, working in different parts of the company was simply too attenuated to relate to this threshold issue.

Id. Because the evidence demonstrated "sporadic and isolated' circumstances, the court agreed that it was properly excluded. *Id. See also, Goff*, 678 F.2d at 597 (exclusion of former employees' testimony proper; evidence, even if admitted, insufficient as a matter of law to establish pattern and practice discrimination).

Here, the Fifth Circuit correctly concluded that the evidence offered by Wyvill and Waldrop did not rise to the level of admissible pattern and practice evidence. United Companies employed in excess of 2700 employees working throughout the country in a number of different divisions, and, as illustrated above, the "anecdotal" evidence introduced at trial involved a minuscule portion of the United Companies workforce and individuals who were not similarly situated to Wyvill and Waldrop. Accordingly, the Fifth Circuit's holding that the district court abused its discretion by allowing this evidence to be admitted into the record was entirely appropriate, and Petitioners did not refer this Court to a single case suggesting otherwise.

2. The Fig-Leaf Argument

Petitioners next contend that the Fifth Circuit dismissed Petitioners' evidence that Respondents' "supervisors violated their own standard employee disciplinary procedures in an effort to build a file on older workers which Respondents then used as a fig-leaf to cover any illegal employment actions." Petition for Writ of Certiorari at 14. The Fifth Circuit assumed that United Companies did not follow standard procedures in compiling disciplinary records on Wyvill and Waldrop (as it is required to

under Rule 50); however, the Court noted that it did not necessarily follow that in assessing the sufficiency of the evidence under Rule 50 such a fact standing alone evidenced age discrimination. In the words of the Fifth Circuit,

> there was no evidence . . . that United Companies kept files only on older workers, or that it complied with standard disciplinary procedures when filing reports on younger workers but flouted them when it came to Wyvill and Waldrop. Nor was there evidence that United Companies faithfully recorded the disciplinary violations of younger workers but fabricated those which, according to United Companies, motivated the terminations of Wyvill and Waldrop . . .In the absence of any nexus between plaintiffs' allegation of file-building and their ages, such assertions are insufficient to create an inference that plaintiffs were fired on account of age.

Petitioners' App. A at 19a.

In other words, while Petitioners offered evidence that United Companies failed to comply with their own standard disciplinary procedure, there was no evidence that this failure was used as a fig leaf to cover illegal employment actions as now argued by Petitioners.

3. Stray Remarks.

Petitioners also argue that the Fifth Circuit impermissibly discounted the weight of the so-called age-based comments attributed to Brown, Sr. Contrary to Petitioners' assertion, *Reeves* does not conflict with the Fifth Circuit's decision here in this regard. In *Reeves*, the statements at issue were made by the decision-maker about the plaintiff. Here, the comments that Petitioners claim were made by Brown, Sr. had nothing whatsoever to do with Petitioners themselves. Furthermore, such statements are even further irrelevant with respect to Waldrop's

claim because Brown, Sr. was not a decision-maker concerning his termination. Finally, the timing of the alleged statements was attenuated from the actual terminations of Petitioners.

B. Misapplying Legal Precedent

The only legal issue before this Court is Petitioners' claim that the Fifth Circuit's ruling is contrary to this Court's decision in *Reeves* because the Fifth Circuit purportedly held that Petitioners' proof of their prima facie case, along with their evidence rebutting the validity of United Companies' proffered explanations, was insufficient to support their age discrimination claims. This contention is subject to attack on at least two bases.

First, this case, at least the claim of Wyvill, does not conflict with *Reeves* because Wyvill never established his prima facie case of age discrimination. United Companies urged the Fifth Circuit to reverse the verdict because Wyvill did not establish a prima facie case.[4] The Fifth Circuit held that "because this case has been fully tried on the merits, we 'need not address the sufficiency of [plaintiffs'] prima facie case . . ." Petitioners' App. A at 9a citing, *Atkin v. Lincoln Property Co.*, 991 F.2d 268, 271 (5th Cir. 1993). Indeed, it was Petitioners, in an attempt to scuttle Respondents' argument before the Fifth Circuit in this regard, who contended that "the plaintiff's prima facie case is no longer relevant." Appeal Brief of Petitioners at 10. Thus, Petitioners' argument that the Fifth Circuit held that a prima facie case plus pretext is insufficient as a matter of law to sustain a jury verdict is factually incorrect since, at a minimum, the lower court disregarded whether a prima facie case had been established in the first place.

More importantly, Petitioners' contention is also incorrect because it misapprehends this Court's ruling in *Reeves*. Assuming that the Fifth Circuit did find that the Petitioners had

4. In *Reeves*, this Court noted that "the strength of the plaintiff's prima facie case" is a factor to consider in assessing whether judgment as a matter of law is appropriate in a given case. *Id.* at 2109.

established their prima facie cases and provided sufficient evidence of pretext, *Reeves* does not establish a per se rule that judgment as a matter of law would be inappropriate. Rather, this Court held that such a showing would not always be adequate to sustain a jury's finding of liability and specifically noted that "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontraverted evidence that no discrimination had occurred," Rule 50 relief would be appropriate. *Id.* at 2109. Respondents submit that this case clearly falls within that category.

Specifically, as discussed above and in the various memoranda filed with the Fifth Circuit, neither Petitioner had a particularly strong prima facie showing. In fact, there is a quite compelling argument that Wyvill did not even meet the de minimis burden of establishing his prima facie case. Similarly, Petitioners had very little, if any, evidence establishing that Respondents' explanations for their discharges were false. For instance, Petitioners do not contend that they did not commit the acts United Companies cited in support of their discharges, *i.e.*, there is an avalanche of unrebutted evidence establishing Waldrop's confrontations with co-workers, supervisors and customers and the fact that Wyvill made the calls which ultimately led to his termination. These facts combined with the complete absence of evidence comparing the Petitioners' treatment with that of similarly situated younger employees makes the Fifth Circuit's decision all the more compelling.

Finally, unlike the plaintiff in *Reeves*, Petitioners provided no evidence of age-biased comments directed at them by decisionmakers, nor did they present a single witness who could attest to their being subjected to discrimination on account of age. In sum, the Fifth Circuit correctly concluded that "neither Wyvill nor Waldrop produced sufficient evidence to allow a reasonable jury to infer that United Companies terminated them because of age" and its ultimate decision does not conflict with *Reeves*.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTED TRANSCRIPT OF PROCEEDINGS

SANDRA MOORE: TR. VOL. II AT 20

A. WELL, THE NORTH CHARLOTTE BRANCH ACTUALLY OPENED IN AUGUST OF 1990, SO FROM THEN UNTIL DECEMBER OF '95, IT WAS ACTUALLY A FOUR-AND-A-HALF-YEAR PERIOD, AND AT LEAST TWENTY-FIVE PEOPLE LEFT.

Q AND FROM YOU OWN PERSONAL KNOWLEDGE OF BEING IN THE BRANCH, DO YOU KNOW WHY THESE PEOPLE LEFT THE BRANCH?

A MANY OF THEM LEFT OUT OF FEAR, INTIMIDATION, OR DUE TO PERSONAL CONFLICTS WITH HIM.

MR. ZATKIS: OBJECTION, YOUR HONOR, TO THE EXTENT SHE'S REVEALING —

THE COURT: OBJECTION SUSTAINED. SHE CAN ONLY TESTIFY AS TO HER OWN KNOWLEDGE.

* * *

Appendix

MARGARET MOON: TR. VOL. V AT 24-26

Q. At the time that Mr. Wyvill left the company in February of 1993 were you promoted?

A. No.

Q. At that time did you assume the position of manager of the Credit Life Department?

A. No, basically nothing changed.

Q. Did you ever assume the manager position at any time in the Credit Life Department?

A. No.

Q. After Mr. Wyvill left, did you receive any kind of a raise?

A. No, sir.

Q. After Mr. Wyvill left, were you then in charge of the personnel responsibilities doing evaluations, those kind of things?

A. No, sir.

Q. Did you do any hiring and firing —

A. No.

Q. — of personnel after Mr. Wyvill left?

A. No, Sir.

Q. You need to just let me finish the question.

A. Okay, sure.

Q. I know you can kind of anticipate it but to keep the record clear. Describe for the jury how your job duties as supervisor changed after Mr. Wyvill left?

A. The duties didn't change. The — probably the amount of work I had to do increased a little bit because there was no one in that position any longer. So, I dealt a little bit more with the agents and the clients than I had previously.

Q. And who took over the management responsibilities after Mr. Wyvill left for the Credit Life Department?

A. Jim Pitchford.

* * *

LINDSAY SEALS: TR. VOL. IV AT 16

Q. WHEN MR. WYVILL WAS TERMINATED, WHO REPLACED HIM?

A. HIS DUTIES WAS SPREAD AMONG SEVERAL PEOPLE.

Q. HOW DID MS. MOON'S DUTIES CHANGE AFTER MR. WYVILL LEFT?

A. HER DUTIES DIDN'T CHANGE. SHE ASSUMED MORE WORK. SHE HAD MORE OF WHAT SHE WAS DOING TO DO, WITHOUT MR. WYVILL THERE.

Q. WHO ASSUMED THE SUPERVISORY OR MANAGERIAL RESPONSIBILITIES THAT MR. WYVILL HAD HAD WHEN HE WAS WORKING AT THE CREDIT LIFE DEPARTMENT?

A. JIM PITCHFORD.

Q. APPROXIMATELY HOW OLD WAS MR. PITCHFORD AT THE TIME?

A. MID-FIFTIES, FIFTY-SOMETHING. I DON'T REALLY KNOW.

* * *

WILLIAM SPANN: TR. VOL. IV AT 218

Q. YOU'VE HAD AN OPPORTUNITY TO LOOK AT THAT. DO YOU KNOW A MARGARET MOON?

A. I DO KNOW WHO MARGARET IS, YES.

Q. DO YOU KNOW THAT SHE WORKED IN THE CREDIT LIFE DEPARTMENT OF UNITED COMPANIES LIFE?

A. YES, SIR.

Q. DO YOU KNOW THAT AT THE TIME OF THE TERMINATION OF MR. WYVILL, SHE WAS HIS ASSISTANT?

A. I KNEW SHE WAS A SUPERVISOR IN THE CREDIT LIFE DEPARTMENT.

Q. AND WORKED UNDER MR. WYVILL?

A. I THINK SHE DID, YES, SIR.

Q. AFTERWARDS, SHE TOOK HIS POSITION, DID SHE NOT, AND MANAGED THE CREDIT LIFE DEPARTMENT AS IT CONTINUED THROUGH '94 AND '95?

A. NOT TO MY KNOWLEDGE, NO, SIR.

* * *

SANDRA STAFFORD: TR. VOL V AT 187

Q. What did Mr. Wyvill say to you during that telephone call?

A. Well, he called me and he said he wanted to know if they had offered me the job, Gerald's job. And I said, "Yes." And he said, "Well, why — why — why was he terminated?" I said, "Well, they didn't tell me that." I said, "They had told me that, you know, it happened." And he — he said, "Are you going to take the job?" And I said, "I don't know. I hadn't decided yet." And he said, "Well, you know if you do, it will be like taking blood money."

Q. How did you feel after he made that comment to you?

A It upset me. I went in my office, shut the door; I was crying.

Q. What did he talk to you in that telephone conversation about the Unlink?

A. Nothing.

* * *

RIDGELY WYVILL: TR. VOL. III at 50-51

Q. WHEN YOU WERE BROUGHT INTO THE MEETING WITH — I BELIEVE YOU SAID IT WAS A SMALL BOARDROOM AND MR. PHILLIPS AND SOME OTHER PEOPLE — WAS MR. PHILLIPS IN THE ROOM?

A. YES, SIR.

Q. WHILE YOU WERE IN THE MEETING, DID YOU DENY MAKING ANY OF THE PHONE CALLS YOU WERE ASKED ABOUT IN THAT MEETING?

A. NO, SIR.

Q. WERE YOU TOLD, IN THAT MEETING, THAT CARL SCOTT WAS UPSET ABOUT THE PHONE CALL YOU MADE TO HIM?

A. I DON'T KNOW IF IT WAS EXACTLY THOSE WORDS, BUT THEY MENTIONED CARL SCOTT, YES, SIR.

Q. DID THEY MENTION WORDS TO THE EFFECT THAT MR. SCOTT WAS UPSET ABOUT YOUR PHONE CALL?

A. I BELIEVE THEY SAID I WAS BATTERING BRANCH MANAGERS OVER HAPPENINGS IN TENNESSEE. THAT'S THE WAY i REMEMBER IT.

Q. WELL, WERE YOU TOLD, IN THAT MEETING, THAT YOU HAD CALLED SANDY STAFFORD AND GOTTEN HER SO UPSET THAT SHE WAS AFRAID TO TAKE THE BRANCH MANAGER POSITION?

A. YES.

Q. ALSO, DURING THAT MEETING THAT YOU HAD WITH MR. WARRINGTON AND MR. SEALS, YOUR SUPERVISOR, AND THESE OTHER FOLKS, YOU WERE ASKED ABOUT A NUMBER OF THE PHONE CALLS YOU HAD MADE, AND THEY SHOWED YOU A TELEPHONE LOG SHOWING SOME TELEPHONE CALLS YOU HAD MADE?

A. YES, SIR.

Q. YOU DIDN'T DENY MAKING ANY OF THOSE CALLS; DID YOU?

A. NO, SIR.

* * *

Appendix

WILLIAM SPANN: TR. VOL. IV AT 88-89

Q. WHAT TELEPHONE CALL DID YOU HAVE WITH MS. STAFFORD IN THAT SAME YEAR?

A. I HAD ONE FOLLOW-UP PHONE CALL WITH MS. STAFFORD IN EARLY JANUARY AFTER I HAD RECEIVED ANOTHER LETTER FROM AN EMPLOYEE, A FORMER EMPLOYEE, OF THE COMPANY, AND I ASKED HER, IS THIS REALLY — ARE THESE THINGS TRUE? IN YOUR BEST ESTIMATION, ARE THESE THINGS REALLY GOING ON, AND SHE SAID YES.

SANDRA STAFFORD: TR. VOL. V AT 163-165

Q. Now, you said that Mr. Spann placed this call to you?

A. Yes.

Q. You did not call Mr. Spann?

A. No.

Q. You did not call anyone in management at that time?

A. No.

Q. Did you have any idea why Mr. Spann was calling?

A. No, not until he called.

Q. What did you tell Mr. Spann about Ms. McMillan?

* * *

A. He just asked me, you know, if — if it was, you know, true about — you know, was she telling the truth and I said, "Yes."

Q. What did you tell Mr. Spann in that telephone call about what Mr. Waldrop was doing besides the incident with Ms. Welch?

A. Well, you know, I mean his changes of temper, you know, like exploding at customers and cussing, you know, getting ill with the customers, raising his voice at them, the language, you know, that we were scared he was going to hurt somebody or, you know, have a heart attack.

Q. How did you feel about your own safety at that point in time?

A. Well, I was afraid. I was afraid he was going to lose it because he would get so upset and clench his fists and shake and get real red faced and — and I mean it was scary.

Q. What did you say to Mr. Spann or someone else in management about how you felt the stability in the office was in terms of the staff?

A. Well, I mean I was afraid everybody was going to leave because of it.

Q. What did you tell Mr. Spann about your ability to continue to work at the company?

A. I — I told him — well, I mean I had been looking for a job myself and I — I — I told him that.

Q. Did you tell him why you were looking for a job?

A. Yes.

Appendix

PAM MCMILLAN: TR. VOL. V AT 281

Q. Why did you leave?

A. Because of Gerald.

Q. And specifically what about —

A. Because of his — the way he cussed the customers, the way he cussed us, the way he ranted and raved and he terrified me. He terrified me to the point that I just couldn't handle it. I just couldn't take it.

CHERYL WELCH: TR. VOL. V AT 93-94

Q. When did you decide to leave United Companies?

A. December of '92.

Q. Was it a voluntary decision?

A. Yes. Even though I — I felt forced.

Q. You felt forced, forced by whom?

A. Gerald.

Q. Would you explain to the jury and to the Court why you left the company?

A. Well, when you go in on a job that you like and you like the other people that you work with and to hear this day in and day out and nothing ever, no matter what you do seems to get done about it, then, you know, you can't go on. You can't

daily taking the pressure. It was as much as I could take.

Q. When you left in December of '92, had any of the other employees already left the office?

A. Pam — Pam.

Q. Pam McMillan had already left?

A. Yes.

Q. How far before you left did Ms. McMillan leave?

A. Probably two months.

Q. Did your decision to leave the branch office at Dalton have anything to do with anything other than Mr. Waldrop's behavior?

A. No.